Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Amendment of the Commission's *Ex Parte* Rules and Other Procedural Rules	GC Docket No. 10-43

COMMENTS OF AT&T INC.

AT&T Inc. (AT&T) files these comments in response to the Commission's Notice of Proposed Rulemaking.[1]

A. Detailed summaries of prior written data or arguments filed in the proceeding are unnecessary.

Once again the Commission is proposing to revise rule 1.1206 to require parties making oral presentations in permit-but-disclose proceedings to summarize *all data and arguments* made during the presentation.[2] At present, such parties need only summarize "all *new* data and arguments."[3]

This proposal is unnecessary and potentially counterproductive. The purpose of disclosure is to

> … serve the "fundamental notions of fairness implicit in due process and . . . the ideal of reasoned decisionmaking on the merits which undergirds all of our administrative law." [Authority omitted.] Only through disclosure of *ex parte* communications may we protect the public's "right to participate meaningfully in the decisionmaking process" and "the critical role of adversarial comment in ensuring proper functioning of agency decisionmaking and effective judicial review." [Authority omitted.][4]

Consequently, once data and arguments proffered by interested parties are on the public record, this purpose is fully met. Indeed, the Commission cannot rely on data not in the public record in

[1] *Amendment of the Commission's Ex Parte Rules and Other Procedural Rules*, Notice of Proposed Rulemaking, ___ FCC Rcd ___, 2010 FCC LEXIS 1084 (2010) (*Notice*).

[2] *Notice*, at ¶ 8. *See also*, *Amendment of 47 C.F.R. § 1.1200 et seq. Concerning Ex Parte Presentations in Commission Proceedings*, Notice of Proposed Rulemaking, 10 FCC Rcd 3240 ¶ 44-5 (1995) (*1995 Notice*).

[3] 47 C.F.R. § 1.1206(b)(2).

[4] N. Carolina v. EPA, 881 F.2d 1250, 1258 (4th Cir. 1989). *See also*, Home Box Office v. FCC, 567 F.2d 9, 56-7 (D.C. Cir. 1977).

its decisionmaking process.[5] The public, in general, and participating interested parties, in particular, are made aware of this filed data and arguments and can tender comments in reply. Due process of law is not furthered by duplicating the written record.

Beyond that, requiring that *every* argument be re-stated or referenced by citation each and every time it is made would impose unnecessary burdens on parties and Commission staff and would likely be counterproductive. In order to comply with such a rule, parties would have to file overly-voluminous *ex parte* notices, increasing the burden on *all* parties and increasing the risk that important arguments and new information would be missed by other parties and Commission staff.

If the Commission nonetheless deems it necessary to require references to old data and arguments covered in written material on file in the proceeding, then that part of the *ex parte* filing should amount to the equivalent of "notice pleading" on a par with what is required in the Federal Rules of Civil Procedure when filing a complaint—a short plain statement of matters discussed that are covered in prior filings—and no more.[6]

In addition, we recommend moving one sentence in the proposed rule—the exception to the general obligation to provide a summary—farther into the paragraph to make it clear that the summary of the old data and arguments can be replaced with citations to the material on file in the proceeding. AT&T recommends:

> (i) A person who makes an oral *ex parte* presentation subject to this section shall submit a memorandum that summarizes all data presented and arguments made during the oral *ex parte* presentation. ~~If the oral *ex parte* presentation consisted in whole or in part of the presentation of data or arguments already reflected in that person's written comments, memoranda or other filings in the proceeding, the person who made such presentation may provide citations to such data or arguments in that person's prior comments, memoranda, or other filings in lieu of summarizing them in the memorandum.~~ Memoranda must contain a summary of the substance of the *ex parte* presentation and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. If the oral *ex parte* presentation consisted in whole or in part of the presentation of data or arguments already

[5] HBO, 567 F.2d at 57 (Information contained in a communication to the Commission that forms the basis for agency action must be disclosed to the public in some form).

[6] *See* Fed. R. Civ. P. 8.

> reflected in that person's written comments, memoranda or other filings in the proceeding, the person who made such presentation may provide citations to such data or arguments in that person's prior comments, memoranda, or other filings in lieu of summarizing them in the memorandum. The memorandum (and cover letter, if any) shall clearly identify the proceeding to which it relates, including the docket number, if any, shall indicate that an original and one copy have been submitted to the Secretary or that one copy has been filed electronically, and must be labeled as an *ex parte* presentation. If the presentation relates to more than one proceeding, two copies of the memorandum (or an original and one copy, or one copy if filed electronically) shall be filed for each proceeding.

B. Parties should be able to search but not change documents filed electronically.

The proposal to encourage electronic filing of documents, including *ex parte* filings, is appropriate. Electronic filing is easy and should facilitate quicker publication of filed documents.

The Commission seeks comments on whether filed documents "should be made in machine-readable format (*e.g.*, Microsoft Word '.doc' format or non-copy protected text-searchable '.pdf' format for text filings, and 'native formats' for non-text filings, such as spreadsheets in Microsoft Excel '.xml' format)."[7] AT&T supports the use of any format that allows simple keyword searches but does not allow readers to alter text or data. AT&T opposes requiring the filing of documents in formats that cannot be protected from post-filing alteration.

C. Disclosure statements are unnecessary and would not improve the evaluation of positions taken in Commission proceedings.

In the *Notice*, the Commission solicited comments on whether "the ability of both the Commission and the public to evaluate the positions taken in Commission proceedings would be improved if parties provided more information about themselves and their interests in the proceedings." AT&T believes that requiring such additional information is unnecessary. In the vast majority of instances, the Commission is well aware of the interests of parties participating in Commission proceedings, and to the extent it is not, it can seek additional information from those parties. Under the circumstances, the additional burden posed by disclosure requirements would far outweigh the limited public benefit from such a requirement.

[7] *Notice*, at ¶ 16.

This point is underscored by the specific models on which the Commission seeks comment— Supreme Court Rule 29.6, Rule 26.1 of the Circuit Rules for the U.S. Court of Appeals for the D.C. Circuit, and the Lobbying Disclosure Act (LDA). In the case of appellate court rules, they require disclosure of a party's "parent corporations and listing [of] any publicly held company that owns 10% or more of the corporation's stock," but typically not the names of members of a trade association or professional association.[8] These sorts of disclosure statements are filed with the courts filed to help the court determine whether there is an actual or perceived conflict of interest, which would give rise to a claim of partiality or the appearance of impropriety.[9]

Under the LDA, subject to certain exceptions, lobbyists are obligated to identify themselves, their clients, and contributors, as well as provide other information concerning their services.[10] LDA has main purpose: "to maintain the integrity of a basic governmental process"—to-wit, legislating.[11] This purpose is facilitated by apprising members of Congress of the identities of the lobbyists who solicit them and their sources of income. The member of Congress wants to know whether the lobbyist is in fact promoting the general good or is in fact seeking to further a narrow special interest.

Thus, these two examples—disclosure statements in judicial proceedings and in legislative lobbying—each have different purposes and standards and require vastly different

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[8] SUP. CT. R. 29.6. *See also,* D.C. CIR. R. 26.1.

[9] A judge is obligated under The Code of Judicial Conduct to

> disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: . . .
>
> (c) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has *an economic interest* in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding; . . . .

MODEL CODE OF JUDICIAL CONDUCT Canon 3, E. Disqualification, Section (1)(c) (2004) (emphasis added).

[10] 2 U.S.C. § 1603.

[11] *U.S. v. Harriss*, 347 US 612, 625 (1954). In essence, Congress wants to know the identity of the people lobbying members for or against specific issues.

information. Therefore it is not entirely clear why and to what degree the Commission feels disclosure statements would improve the evaluation of filings. AT&T, for example, has over 600 subsidiaries. Other corporations have similarly large portfolios. It would serve no purpose whatsoever to make AT&T disclose its subsidiary companies in public filings or repeatedly point out the companies regulated by the Commission or provide information on the publicly traded holding company. Neither the Commission nor any other interested person can seriously claim not to know AT&T's interests in the proceedings in which it files—or those of other corporate entities, such as Verizon, Comcast, Google, EchoStar, *etc* Comments made at the Workshop on Improving Disclosure of Ex Parte Contacts would indicate both that any concerns in this area are small to non-existent and that they are limited to rare occasion where the public may not be apprised of a filer's allegiances.[12]

It is difficult to see how disclosure statements would greatly improve the ability of the Commission or the public to evaluate the positions taken by parties in Commission proceedings. Because there is no connection between the information provided in disclosure statements and the validity of a point of view or the strength of an argument, it does not follow that requiring the former will improve the evaluation of the latter. This proposal has all the earmarks of a solution looking for a problem. It certainly makes no sense to have the certificated and licensed entities regulated by the Commission file disclosure statements. And the Commission shouldn't burden the vast majority of commenters, whose affiliations and interests are well known to the Commission and the general public, to address the insignificant concerns raised on the rare occasion by lesser known filers.

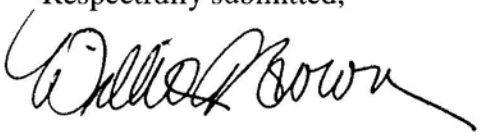
[12] The comments made during the Workshop on Improving Disclosure of Ex Parte Contacts were less than compelling (*e.g.*, ""it's an occasional problem," (Tr. 106:6-7) "I'm not sure it's a big issue . . . if we're talking about permit but disclose proceedings or rulemaking types of proceedings," (Tr. 107:9-12) and "it has not been a huge problem except that I think the place where it is a problem is John Q. Public because … random people in the public may not know that [a person is really representing a particular organization]" (Tr. 108:3-9)).

D. The Commission has adequate authority to enforce its *ex parte* rules; sanctions should be limited to clear violations of the rules only.

The Commission has been given more than adequate means by which to enforce its own rules, including those pertaining to *ex parte* communications. Presently, the Commission has a great deal of discretion when assessing penalties. The Commission is allowed to consider "the nature, circumstance, extent and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offense, ability to pay, and such matters as justice may require."[13] Using these factors, the Commission has been able to tailor to its satisfaction the forfeiture penalty to the individual violator and violation.

With respect to the specific issue of inadequate *ex parte* filings in permit-but-disclose proceedings, the Commission can simply to ask the filing party expeditiously to remedy the deficiency in the *ex parte*.[14] In appropriate circumstances—for example, if a party fails to file any *ex parte* notice and such failure is not inadvertent or if a party repeatedly violates the *ex parte* rules—additional measures can be taken, including appropriate sanctions. Additional authority or special sanctions are unnecessary as the Commission has a sufficient arsenal in the Act and in its rules to address any violation the Commission deems appropriate to redress. [15]

Respectfully submitted,



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[13] 47 U.S.C. § 503(b)(1)(D). *See also* 47 C.F.R. § 1.80(b)(4).

[14] According to the *GAO Management Report*, the "FCC receives, on average, one complaint a month about *ex parte* communications." GAO, *FCC MANAGEMENT, Improvements Needed in Communication, Decision-Making Processes, and Workforce Planning*, GAO-10-79, at 33 (Dec. 2009).

[15] For example, under present authority, the monetary penalty the Commission can assess against common carriers under Section 503 of the Act can range up to $150,000 per violation, not to exceed $1,500,000. *See* 47 U.S.C. § 503(b)(2)(B); 47 C.F.R. § 1.80(b)(5).

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